INDEX.

Petition for Writ of Certiorari.

Statement of matter involved 2
Jurisdiction of this court 15
Manner in which federal questions were raised in the state courts 16
Questions presented 19
Reason relied on for allowance of writ 20
Conclusion 22

Brief Annexed.

Opinion of the courts below 23
Jurisdiction of this court 23
Statement of the case 23
Specification of errors 23
Argument 27
Systematic, intentional and deliberate elimination of minority religious faiths and races from jury panel deprived petitioner of equal protection of law 27
Systematic, intentional and deliberate elimination of minority religious faiths and races from jury panel deprived petitioner of due process of law 32
The prejudice and bias of the trial judge toward petitioner deprived him of due process of law 36
Conclusion 40
Motion to dispense with printing record 41

Authorities Cited.

Ballard v. United States, 67 S. Ct., 261..... 35

Carter v. Texas, 177 U. S., 442, 44 L. Ed., 839, 20 S. Ct., 687 .....27, 28

Glasser v. United States, 315 U. S., 60, 86.....
.....29, 31, 32, 33, 35

Hale v. Kentucky, 303 U. S., 613, 82 L. Ed., 1050, 58 S. Ct., 753 27

Hill v. Texas, 316 U. S., 400, 86 L. Ed., 1559, 62 S. Ct., 1159 27

Juarez v. State, 102 Tex. C. R., 297, 277 S. W., 1091.
.....28, 31

Lane v. Wilson, 307 U. S., 268..... 29

Neal v. Delaware, 103 U. S., 370, 26 L. Ed., 567..... 27

Norris v. Alabama, 294 U. S., 587, 79 L. Ed., 1074, 55 S. Ct., 753 27

Peirre v. Louisiana, 306 U. S., 354, 83 L. Ed., 757, 58 S. Ct., 536..... 27

Rogers v. Alabama, 192 U. S., 226, 48 L. Ed., 417, 24 S. Ct., 257..... 27

Sharkey, et al. v. Thurston, 268 N. Y., 123..... 37

Smith v. Texas, 311 U. S., 128, 85 L. Ed., 84, 61 S. Ct., 164 .....27, 29, 31, 33

Strauder v. West Virginia, 100 U. S., 303, 25 L. Ed., 664 27

Thiel v. So. Pac. Railroad, 66 S. Ct., 984.....34, 35

Tumey v. State of Ohio, 273 U. S., 510..... 39

Whittaker v. McLean, 118 Fed. (2d), 596..... 39

Supreme Court of the United States

OCTOBER TERM, 1946.

No. .....

JEROME A. NEVIUS,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice of the United States and to the Associate Justices of the Supreme Court of the United States:

The petition of said Jerome A. Nevius for a review on writ of certiorari of the decision of the Ohio Supreme Court respectfully shows:

STATEMENT OF MATTER INVOLVED.

Stated as briefly as possible, this cause was tried in the Court of Common Pleas of Clark county, Ohio. The judge thereof will hereinafter be referred to as the trial judge. From the beginning of these proceedings and until they were terminated in said Common Pleas Court, the trial judge followed a course of conduct indicating a strong bias and prejudice against your petitioner.

On October 2, 1944, the trial judge, without granting a hearing to your petitioner as prosecuting attorney of Clark county, appointed an assistant prosecuting attorney for said county to procure an indictment against the petitioner, stating in the entry of appointment that "the present prosecuting attorney was under a 'certain disability'." (R., 16.)

Before finding that petitioner was under a "certain disability" there was no hearing had. (R., 20.) The petitioner was given no opportunity whatsoever to appear before the court and to explain his conduct, and to have rights of a hearing as prescribed by the Supreme Court of Ohio. The trial court took this action during the heat of a political campaign wherein petitioner was a candidate for his third term—as prosecuting attorney. This effort of the trial judge to embarrass the petitioner in his campaign for re-election was of no avail, however, and petitioner was re-elected, being the only candidate of his party to be elected in said county.

On December 5, 1944, as a result of the efforts of the trial judge, petitioner was indicted, together with certain known gamblers, in an indictment containing six

counts. (R., 2-6.) Said indictment contained three counts, second, fourth and sixth, charging petitioner with receiving certain bribes and the other three counts charged the said gamblers with giving said bribes. (R., 2-6.) Is it not strange that even to this date the trial judge has not ordered the gamblers tried? This indicates the bias and prejudice of the trial court to the petitioner.

Further demonstrating his bias and prejudice, the trial court manifested feverous interest and activity in securing the indictment against the petitioner and his conviction. (R., 15-18, 938.) The trial court secured the services of assistant prosecutors and appointed them and interested himself in securing compensation for them. (R., 16.) He shared his chambers with these assistant prosecutors and conferred with them in the preparation of the evidence and procedure against the petitioner. (R., 919-20.) He arranged for the use of two state highway patrol officers to assist the assistant prosecuting attorney, appointed by the court, to interview witnesses and to gather evidence against the petitioner. (R., 904.) Such use of the state highway patrol officers was contrary to the law of Ohio. (R., 45.) The trial judge conferred with these two state highway patrol officers from time to time while they were engaged in building up a case against the petitioner. (R., 904-905.)

After the indictment was returned against the petitioner, the trial judge used his power, authority, and prestige, to summon witnesses to appear before him and to give testimony under oath in an effort to prepare a case against the petitioner. (R., 45, 900-904.) The petitioner was not advised of the taking of such testimony

to be used against him, nor was he in any manner notified of such proceeding.

The presence of the accused is mandatory. There is no authority whatsoever in the law of Ohio, for any procedure, as here taken, after the return of the indictment.

The trial judge delivered to the prosecution certain private letters that he had received, containing hearsay matter about the petitioner, which was then caused to be published in the press in Clark county to inflame the public mind to the prejudice of the petitioner. (R., 45, 914-919.)

Your petitioner strenuously objected to all of this procedure on the part of the trial court. He filed an affidavit of prejudice and bias in the Supreme Court of Ohio to have the trial judge removed, and this affidavit was heard by the chief justice of the Supreme Court of Ohio, who refused to remove the trial judge. (R., 19.) A second affidavit of prejudice and bias was filed in which your petitioner alleged that the trial judge was disqualified to sit in the trial of his case; that he, the petitioner, was entitled to a fair and impartial presiding judge; and that to permit said trial court manifesting such bias and prejudice to sit would deprive petitioner of his rights as a citizen of the United States of America of the due process of law guaranteed him under the Fourteenth Amendment to the Constitution of the United States. (R., 44-45.) Your petitioner offered in evidence at this hearing eighty affidavits made by reliable and responsible citizens of Clark county, in which they swore under oath that petitioner could not have a fair trial with said trial judge presiding. The chief justice ruled

that this evidence was not admissible. (R., 895.) Your petitioner established at the hearing on the second affidavit of bias and prejudice that the trial judge could not preside over this cause in a wholly free, disinterested, impartial and independent capacity. At this hearing the trial judge himself admitted that he had a pecuniary interest in the outcome of the trial, as he was vice-president, stockholder, and member of the board of directors of a corporation which maintained and carried on a highly lucrative gambling lottery in numerous theatres within the jurisdiction of said judge in violation of the Constitution and laws of Ohio. (R., 907-911.)

Your petitioner, as prosecuting attorney, had attempted to present evidence to the grand jury of the lottery in which the trial court was active, which would have resulted in the ouster of said corporation from the state of Ohio, and would further have resulted in substantial pecuniary loss to the trial judge, as a stockholder in the corporation which was conducting the lottery. (R., 939-40.) Fuel was added to the bias and prejudice of the trial court against the petitioner from his knowledge that if the grand jury took action against the gambling operations of the trial judge, his office as judge might well be imperiled.

The chief justice of the Supreme Court of Ohio clearly recognized the federal question raised, and in his opinion, refusing to unbench the said trial judge, spoke in part as follows:

> "In conclusion, Mr. Nevius says in his affidavit, that by reason thereof said judge is disqualified to sit in the trial of this case as a fair and impartial presiding officer, and the defendant, Jerome A.

> Nevius, is being deprived of his rights of a citizen of the state of Ohio and of the United States, of the due process of law as guaranteed to him by Article I, Section 16 of the Constitution of the state of Ohio, and under the Fourteenth Amendment to the Constitution of the United States of America." (R., 958.)

The chief justice of the Supreme Court of Ohio did, however, leave the decision with the said trial judge whether he would sit in the trial or ask the assignment of another judge. From the opinion of the chief justice on this point is the following:

> "I want to repeat the thing that was said at the conclusion of the hearing on the position of the court here at the first hearing on the affidavit of prejudice when it was said to counsel in the case that the overruling of the matter of bias and prejudice leaves the matter exactly where it was when the affidavit was filed. All that means, as counsel and Judge Davis knows, that the matter is left entirely at his discretion, that he will serve as the presiding judge or whether he shall make the request for a visiting judge.
>
> "That observation is made without any long range suggestion. The judge can then follow any one of those courses. It is a matter for him to decide whether he shall hear it or whether he shall ask the assignment of a visting judge." (R., 960.)

The trial judge—Davis—chose to preside at the trial of the petitioner, and his bias and prejudice as deposed in the above-mentioned affidavit of the petitioner became more apparent as the cause proceeded. The indictment was returned on December 5, 1944. It contained six counts, three of which charged petitioner with accepting

a bribe, and three counts charging two known gamblers of giving bribes to him. (R., 2-6.) Your petitioner filed a motion on January 25, 1945, asking that he be tried separately and apart from the said gamblers. (R., 21-22.) The trial judge did not pass on this motion until June 19, 1945, the day the trial of this cause began. (R., 46.) It was then sustained. The petitioner did not know until the actual beginning of the trial whether he would be tried jointly with alleged gamblers and bribe givers, or whether he would be tried separately. This action of the trial judge manifestly placed the petitioner at a serious disadvantage in preparing his defense, as his defense in a joint trial would obviously be different than in his defense if separately tried.

Petitioner has contended, pleaded and argued, and filed two affidavits of prejudice, knowing himself and insisting that the bias and prejudice of the trial judge would absolutely preclude him from having a fair trial.

Your petitioner early requested the prosecution for a bill of particulars. (R., 11.) The prosecution gave petitioner a sham bill of particulars which merely re-stated the charges in the indictment. (R., 37.) Your petitioner then moved the court for an order requiring the furnishing of a bill of particulars under the provisions of Section 13437-6 of the General Code of Ohio, which provides in part as follows:

> "Provided, that the prosecuting attorney, if seasonably requested by the defendant, or upon order of the court, shall furnish a bill of particulars setting up specifically the nature of the offense charged." (R., 41.)

The court overruled this motion for a bill of particulars. (R., 47.)

Petitioner's apprehension over the vagueness of the sixth count in the indictment, and his insistence that he be apprised by a bill of particulars the charge against him, was clearly warranted, as his conviction on this count was the only one upheld by the Ohio Supreme Court. (R., 195.) This count merely charged that for a period of three and a half years from January 1, 1941 to July 1, 1944, petitioner had accepted large sums of money as a bribe. (R., 5.) His conviction on this count was upheld on the theory of a conspiracy which he certainly could not be expected to meet under this indictment. By denying petitioner a bill of particulars, the trial judge again displayed his bias and prejudice.

As the prosecution presented its evidence, it developed that its theory was based upon a conspiracy, and that the charge in the indictment was only incidental to the conspiracy.

This is succinctly stated in paragraph eight of the syllabus laid down by the Supreme Court of Ohio in this language:

> "It is not necessary that such conspiracy be one to permit the identical offense charged in the indictment, it being sufficient that the offense charged in the indictment be incidental to the conspiracy." (R., 171.)

By reason of his sharing of his chambers with the assistant prosecuting attorney appointed by him, and his conferences with his appointed prosecuting attorney, the trial judge learned of the theory of the case as it would

be presented by the prosecution. He was ready to rule on the question of conspiracy when it arose in the trial. (R., 607-609.) For months the prosecution had been building up its case of conspiracy; the trial judge knew it, yet the petitioner was denied this knowledge by the action of the court in overruling his motion for a bill of particulars, the right to be informed of the nature of the cause against him. This placed the petitioner at a most serious disadvantage. The refusal of the trial court to permit the petitioner to be advised of the true nature of the charge against him was but another example of the studied bias and prejudice that the trial court entertained against the petitioner.

As it became more evident that the trial judge was going to exert every effort and use of his office to obtain the conviction of petitioner, the latter, in an attempt to assure himself at least a fair and impartial jury, filed the following motion on June 13, 1945, six days before the trial began:

> "Now comes defendant, Jerome A. Nevius, and by his counsel, Paul M. Herbert and Aaron J. Halloran, and moves that the court shall order a number of jurors to be drawn by the jury commissioners for immediate service in the trial of the above entitled cause, and that each and every juror to be called before the court in the trial of this cause shall be drawn from the jury wheel." (R., 44.)

The trial judge never ruled on this motion.

The trial judge selected the jury which was to try and did try the petitioner. (R., 57.) A regular venire of jurymen had been drawn and summoned and were available for the trial. However, a special venire of

twenty-two names was drawn from the jury wheel. Strangely enough one member so drawn had served on the grand jury which indicted the petitioner. A challenge to the array for this reason was sustained. (R., 52.) Twenty-two more names were then drawn from the jury wheel. (R., 53.) These names were quickly exhausted because of the great public interest in the cause, and the members of this venire were excused by the trial judge. At this juncture, the prosecution moved the court to select personally talesmen rather than to draw additional names from the jury wheel. (R., 57.)

Simultaneously the petitioner moved that the court draw additional names of jurymen from the jury wheel. (R., 209.) The court ignored petitioner's motion, but sustained the motion of the prosecution, retired to his chambers, and drew up a list of personally selected talesmen, to serve as jurors in the cause. (R., 57.) In all, the trial judge personally selected fifty-five persons before a jury was complete. (R., 94-99.) Not knowing the trend and extent of the motives of the trial judge in selecting the jurors as will hereinafter be disclosed, the petitioner stated that he was satisfied with the jury.

Becoming apprehensive of the unusual procedure followed by the trial judge in personally selecting fifty-five talesmen, petitioner caused an investigation to be made by a reputable investigating agency of Springfield, Clark county, Ohio. (R., 89.) Then for the first time, petitioner, after studying the report, realized that all fifty-five of the talesmen personally selected by the trial judge were of the Protestant faith, and that not one member of the Catholic faith, the Hebrew faith, or the Negro

race had been included in the list of talesmen so selected. (R., 89.) These excluded religious faiths and race comprise thirty percent of the population of the county. (R., 90.) Your petitioner is a Catholic, and this was widely known, as he was very active in the church of his faith. This was a studied manipulation of the system of procuring jurors by the trial court to deny to the petitioner an impartial jury and a fair trial. It is but further evidence of the bias and prejudice shown by the trial judge against the petitioner throughout the entire proceedings. Years ago in Clark county strong feeling was aroused against members of the Catholic faith and other minorities, and the colored race. This feeling is still present.

Following this court's opinion in Glasser v. United States, 315 U. S., 60, your petitioner submitted evidence and proffered proof to support his affidavit that the jury panel contained only persons who were of the Protestant faith and the white race, and that this situation arose from an unfair manipulation of the method of selecting jurors. The trial judge not only refused to consider this evidence, but ordered it physically stricken and expunged from the record. (R., 104-105.) This was done at the hearing on the motion for a new trial. In the twenty-two names of jurors drawn from the jury wheel, and which were excused by the trial judge, there were five Catholics, and one Negro. In the fifty-five designated by the trial judge, not a single member of the minority faith and race were selected. The trial judge knew, and it was widely known throughout the county, that petitioner was a member of the Catholic faith. He

had been active in his church, and was identified with that faith. The trial court purposely and deliberately, knowing these things, refused to draw a jury from the jury wheel, which would have resulted in a fair and impartial jury, but resorted to a list which he had prepared himself. Petitioner again raised this whole question of the prejudice and bias of the trial judge and of the selection of the jury and the results thereof on a motion for a new trial. This motion was overruled, and we quote from the opinion of the trial court:

> "But as already indicated, the basic question is: did the defendant have a fair trial before a fair and impartial jury?" (R., 119.)

Petitioner appealed his conviction to the Court of Appeals, which court did not need to decide whether petitioner had been given a fair and impartial trial or whether the prejudice and bias of the judge had deprived him of his rights under the Fourteenth Amendment to the Constitution of the United States inasmuch as they reversed on the weight of the evidence. The Court of Appeals discharged petitioner on the second and sixth count of the indictment and remanded the cause for a new trial on the fourth count in the indictment. They based their reversal and discharge on the weight and sufficiency of the evidence and did not decide whether the trial court had been prejudiced and biased or whether petitioner had been given a fair and impartial trial.

The prosecution carried this case to the Supreme Court of Ohio and consequently did not themselves raise the federal question on their appeal. In the opinion of the

Supreme Court of Ohio the federal question was not even mentioned, and the only notice that we received from our argument that we had been deprived of our rights under the Fourteenth Amendment of the Constitution of the United States was the statement in the opinion that:

> "We are of the further opinion that it does not affirmatively appear from the record that the accused was prejudiced or prevented of having a fair trial." (R., 194.)

Justice Charles Zimmerman, of the Supreme Court of Ohio, a resident of Springfield, Clark county, Ohio, and acquainted with the parties to the action, withdrew from consideration of the cause when it reached the Supreme Court of Ohio for the reason that he was a resident of Springfield and was acquainted with the parties and had heard the case discussed. Contrast this recognition of the integrity of the courts with the determined and persistent stand taken by the trial court that he would not step aside and request that another judge be assigned.

The Ohio Supreme Court upheld the appellate court in discharging petitioner on the second count, reversed the appellate court on remanding the cause for a new trial on the fourth count, but rather discharged petitioner on that count on a question of jurisdiction. They reversed the Court of Appeals' findings on the sixth count and held that a conspiracy had been proven and consequently petitioner should be held on the sixth count, and that the Court of Appeals erred in discharging him on that count.

Petitioner filed an application for re-hearing in the Supreme Court of Ohio, and therein again specifically called to the court's attention that he had been denied the protection and guaranty of the Constitution of the United States. (R., 196.) It was urged that petitioner had been deprived of his constitutional rights to a fair and impartial trial because of the prejudice and bias of the trial judge, and the resultant effects this had upon the trial of the cause. (R., 197-200.) He specifically pointed in his application to the various points which he had raised at the earliest possible time that he had been deprived of his constitutional rights, and he likewise pointed out that the Supreme Court had ignored these contentions as had the Court of Appeals. (R., 198.)

Such, then, is the state of the record as it now exists as we present this petition for a writ of certiorari.

JURISDICTION OF THIS COURT.

A.

The jurisdiction of this court is invoked under Section 237 (b) of the Judicial Code, (28 U. S. C. A., 344) as amended by act of January 31, 1928, Chapter 14, 45 Stat., 54.

B.

Your petitioner was denied rights and privileges guaranteed to him by the Fourteenth Amendment to the Constitution of the United States. The pertinent portion of which is as follows:

> "Nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Sixth Amendment to the Constitution of the United States and its protection was denied the petitioner. The pertinent portion thereof follows:

> "By an impartial jury", and also "and to be informed of the nature and cause of the accusation."

C.

The judgment in this cause was rendered by the Supreme Court of Ohio on January 15, 1947. An application for rehearing was filed January 29, 1947, in accordance with the rules of practice of said court, was entertained, considered and denied February 13, 1947.

THE MANNER IN WHICH THE FEDERAL QUESTIONS SOUGHT TO BE REVIEWED WERE RAISED IN STATE COURTS.

A federal question was squarely raised in this case. First in an affidavit of prejudice and bias made by petitioner in an attempt to remove the trial judge prior to trial. The hearing on this affidavit was had before the chief justice of the Ohio Supreme Court who held that petitioner had not or would not be deprived of his rights under the Fourteenth Amendment to the Constitution of the United States. (R., 958.) The federal question was argued throughout this case. It was squarely saved in the assignment of errors to the Court of Appeals. (R., 124-125.) It was saved at all stages of the proceedings by continual argument and objection to the method and system used by the trial judge in convicting petitioner. It was strenuously argued in an application for re-hearing before the Supreme Court of Ohio. (R., 197-200.) The trial court gave very little attention to this federal question. From the opinion of the trial court the following is quoted:

> "But as already indicated, the basic question is: did the defendant have a fair trial before a fair and impartial jury?" (R., 119.)

The Court of Appeals gave no more attention to the strenuous arguments made by petitioner that he had been deprived of his rights guaranteed to him by the Fourteenth Amendment to the Constitution of the United States merely stating that they had considered the other assignment of errors and found them without merit.

However, it should be said that the Court of Appeals did reverse the trial court in all of its findings. The Supreme Court of Ohio likewise gave little attention to the biggest point argued by your petitioner, that of the prejudice and bias of the trial court in selecting his own jury. From their opinion we quote:

> "We are of the further opinion that it does not affirmatively appear from the record that accused was prejudiced or prevented of having a fair trial." (R., 194.)

Petitioner did everything in his power to properly and squarely save this federal question in the state Supreme Court. The state had appealed this case and consequently did not raise the federal question in their assignment of errors. Petitioner did not file a cross-assignment of errors, but this was not necessary under Ohio law in order for the Ohio Supreme Court to decide this question. Clark v. Stuart, 126 O. S., 263.

The federal question fairly presented by the record was necessary to a determination of this cause, and there was no adequate non-federal ground for the decision. Chapman v. Goodnow's Administrator, 123 U. S., 540, 8 S. Ct., 211, 31 L. Ed., 235. The failure of the appellate courts to refer directly to the federal question in their opinion does not establish that the questions were not properly raised in these courts. International Harvester Company of America v. Missouri, etc., 234 U. S., 199, 34 S. Ct., 859, 58 L. Ed., 1276. Federal rights are denied as well by a refusal of the state courts to decide questions presented as by an erroneous decision of them. Lawrence v. State Tax Commission of Mississippi, 286 U. S., 276, 52 S. Ct., 556, 76 L. Ed., 1102, 87 A. L. R., 374.

The federal question and the ground therefor, were brought to the attention of the state courts with "fair precision", and the record as a whole shows expressly, or at least with clear intendment, that this was done. New York, ex rel. Bryant, v. Zimmerman, 278 U. S., 63, 49 S. Ct., 61, 73 L. Ed., 184, 62 A. L. R., 785.

The particular clause of the Constitution relied upon and the rights claimed thereunder unmistakably appear. Michigan Sugar Company v. Michigan, 185 U. S., 112, 22 S. Ct., 581, 46 L. Ed., 829.

Each of the questions raised was substantial. Zucht v. King, 260 U. S., 174, 43 S. Ct., 24, 67 L. Ed., 194. Each denied to petitioner fundamental rights to a fair trial guaranteed as a part of due process of law under the Fourteenth Amendment to the Constitution of the United States.

Your petitioner has at all times during the trial and appeal of this cause contended that the open prejudice and bias of the trial judge, the refusal to furnish a bill of particulars, and the improper selection of talesmen from the Protestant faith alone, have deprived him of his rights without the due process of law guaranteed to him under the Fourteenth Amendment to the Constitution of the United States. However, if this court feels that the record does not show that the federal question was raised and necessarily determined, we respectfully request that you vacate the judgment and remand the record to the state court to enable it to show the federal question and its disposition. State Tax Commission v. VanCott, 306 U. S., 511; Patterson v. Alabama, 294 U. S., 600, 55 S. Ct., 575, 79 L. Ed., 1082.

QUESTIONS PRESENTED.

Petitioner believes that all of the questions presented on his appeal are important and that they appear fully in the specifications of errors in the brief in support of the petition herein. However, there are two main questions presented here which concern the violation of petitioner's constitutional rights, and he believes they involve questions of national importance:

(1) Did the open prejudice and bias of the trial judge as evidenced by his actions and rulings before trial, during the trial and after trial deprive petitioner his rights under the Fourteenth Amendment to the Constitution of the United States?

(2) Did the trial and conviction of petitioner for the commission of a crime by a jury from which all members of the Catholic and Jewish faith and of the Negro race were systematically, intentionally and deliberately excluded, deny to petitioner his rights under the Fourteenth Amendment to the Constitution of the United States?

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

The decision of the Ohio Supreme Court is in direct conflict with the decisions of this court. After being fully apprised of the method by which the trial judge selected the jury, and of the fact that all of the talesmen selected by the trial judge were Protestants when the defendant himself was a Catholic, the Supreme Court of Ohio said in its opinion:

> "We are of the further opinion that it does not affirmatively appear from the record that the accused was prejudiced or prevented of having a fair trial."

This court has consistently held that a jury must be selected from a "cross-section" of the community. Glasser v. United States, 315 U. S., 60; Thiel v. Southern Pacific Railroad, 66 S. Ct., 984; Ballard v. United States, 67 S. Ct., 261. The Ohio Supreme Court gave absolutely no heed to these decisions and completely ignored petitioner's rights as guaranteed by the Fourteenth Amendment to the Constitution of the United States as interpreted by this court.

The trial court completely ignored the direction of this court that there should be no discrimination against any racial or religious group in the selection of a jury and that it is a denial of procedural due process and equal protection in criminal cases to purposely omit a minority racial or religious group in the selection of a jury.

With the continued rise of racial and religious hatred groups in this country, it becomes ever more essential that this court squarely pass upon the question of whether a court or any governmental agent can purposely omit minority religious groups in their selection of juries. This court has on many occasions held that it was necessary to at least include members of the colored race in the consideration of prospective jurors. Powell v. Alabama, 287 U. S., 45; Norris v. Alabama, 294 U. S., 587; Patterson v. Alabama, 294 U. S., 600; Hollis v. Oklahoma, 295 U. S., 394; Brown v. Mississippi, 297 U. S., 278. This court has many times stated that it was likewise necessary to give consideration to minority religious groups. Strauder v. West Virginia, 100 U. S., 303; Smith v. Texas, 311 U. S., 128; Thiel v. Southern Pacific Railroad, 66 S. Ct., 984; Ballard v. United States, 67 S. Ct., 261; Carter v. Texas, 177 U. S., 442; Glasser v. United States, 315 U. S., 60. However, this court has never directly had before it the question of studied and intentional elimination of minority religious groups by the court in the selection of juries, and when an accused cites the various cases handed down by this court, he is always confronted with the problem of "dicta", and the state courts in defense of the unconstitutional methods used by trial judges in their designation and selection of jurors are quick to override and literally overrule the decisions of this court by stating that it was mere dicta in the opinion of this court. This court should now directly pass upon these religious issues in the selection of jurors.

Your petitioner feels that the only reason that the state courts did not pass upon this question was because they

did not want to raise the religious issue herein involved. As in the past, it is necessary again for an accused to look to the Supreme Court of the United States to have the rights guaranteed to him under the Fourteenth Amendment to the Constitution of the United States assured. State courts will not pass upon these questions unless they are absolutely forced to do so.

We respectfully submit that this court should decide this grave constitutional question which is of utmost importance to minority religious groups and consequently to the whole nation. The state courts are in great need of further direction from this court on this question.

CONCLUSION.

Wherefore, petitioner prays for the allowance of a writ of certiorari to the Ohio Supreme Court in this cause, in order that it may be reviewed and determined by this Honorable Court, and that execution of the judgment appealed from be stayed pending its review by this court.

Respectfully submitted,

PAUL M. HERBERT,
ROBERT E. TEAFORD,
FRANK L. NEVIUS,
Counsel for Petitioner.

AARON J. HALLORAN,
Of Counsel.

BRIEF.

OPINION OF THE COURTS BELOW.

This case in the trial court was not reported, but the trial court's opinion appears on pages 113 to 122 of the record. The Court of Appeals' opinion is reported in 77 Ohio App., 161, and appears on pages 141 to 163 of the record. The Ohio Supreme Court's opinion is reported in 147 O. S., 263, and appears on pages 169 to 195 of the record.

JURISDICTION OF THIS COURT.

A full statement of the jurisdiction of this court appears on page 15 of petition, and for brevity is not repeated here.

STATEMENT OF THE CASE.

A full statement of the case appears in petition, commencing on page one, and for brevity is not repeated here.

SPECIFICATION OF ERRORS.

The Supreme Court of Ohio erred in affirming the errors of the trial court as follows:

(1) The trial court, before, during and after the trial of the petitioner displayed marked prejudice and bias against petitioner in the following particulars:

(a) The trial court personally selected fifty-five talesmen from which the jury was finally chosen, and in so

doing wrongfully manipulated the laws of Ohio providing for the selection of a jury, resulting in the seating of a jury which was not truly representative of the community of Clark county, Ohio; excluded from the jury racial and religious minorities—those of the Catholic and Jewish religious faith and members of the Negro race—constituting 30% of the population of said county; compelled petitioner, a known member of the Catholic faith and active in his church, to stand trial before a jury so manipulated and selected by the trial court from members of the white Protestant faith.

(b) The trial court erred in refusing to hear or consider petitioner's proof of said manipulation in the selection of the jury; erred in physically expunging such proof from the record; erred in sustaining motion of the prosecution to deny petitioner's right to present evidence of such manipulation in the selection of the jury, and present proof that the jury was not properly constituted, or truly representative of the community.

(c) The trial court erred in refusing to order the prosecution to furnish the petitioner with a bill of particulars apprising and informing petitioner of the nature of the charge that he was required to meet; erred in compelling petitioner to stand trial upon a charge of conspiracy without any allegation in the indictment apprising petitioner of any such charge of conspiracy and that offense actually charged in the indictment was merely incidental to conspiracy; erred in compelling petitioner to stand trial wherein the prosecution prepared its case and introduced its evidence wholly on the theory of a conspiracy, no allegation thereof appearing in the indictment.

(d) The trial court refused to grant a hearing to the petitioner, as prosecutor of the county of Clark, Ohio, before finding that the petitioner was under a disability precluding him from the performance of his official duties.

(e) The trial court erred in taking a personal interest in the preparation of the case against the petitioner; participating in conferences with the attorneys for the prosecution in preparation of the case; securing the assignment of two members of the highway patrol of Ohio to take an active part in the interviewing of witnesses and the assembling of evidence for the prosecution; in conferring with these highway patrolmen; in conducting hearings wherein witnesses were sworn to give testimony against the petitioner after indictment was returned and without notifying petitioner of such hearings and denying petitioner's right to be present at such hearings.

(f) The trial court erred in refusing to pass upon petitioner's motion for severance filed on January 25, 1945, until the day of the commencement of the trial, June 19, 1945, thereby denying to petitioner his right to be accorded reasonable opportunity to prepare his defense to the charge upon which he was to stand trial.

(2) The Supreme Court of Ohio erred in affirming the decision of the chief justice of said court in refusing to assign another judge to preside at the trial after hearing was had upon two affidavits of prejudice and bias filed by the petitioner against the trial court in the following particulars:

(a) It was established at said hearing that the trial court had a financial interest in securing a conviction of the petitioner; the trial court itself was an important participant in a gambling syndicate which was operating widely in Clark county and feared a grand jury investigation of his gambling activities by the petitioner; that the trial court was the accuser, selected the jury and was the judge.

(3) The Supreme Court erred in denying petitioner's application for rehearing.

(4) The Ohio Supreme Court erred in not directly passing on petitioner's contention that the deliberate and intentional exclusion of minority religious and racial groups from the jury panel was in violation of the due process of law clause in the Fourteenth Amendment to the Constitution of the United States.

ARGUMENT.

FIRST POINT.

The trial of petitioner by a jury selected from talesmen from which all members of the Catholic and Jewish religious faith and members of the Negro race were systematically, intentionally and deliberately excluded by direct manipulation in the selection of a jury denied petitioner of the equal protection of laws in contravention of the Fourteenth Amendment to the Constitution of the United States.

This court has held on numerous occasions that the deliberate and intentional exclusion of the Negro race from trial juries either by statute or by action of court officials violated the equal protection clause of the Fourteenth Amendment.

Strauder v. West Virginia, 100 U. S., 303, 25 L. Ed., 664;
Neal v. Delaware, 103 U. S., 370, 26 L. Ed., 567;
Carter v. Texas, 177 U. S., 442, 44 L. Ed., 839, 20 S. Ct., 687;
Rogers v. Alabama, 192 U. S., 226, 48 L. Ed., 417, 24 S. Ct., 257;
Norris v. Alabama, 294 U. S., 587, 79 L. Ed., 1074, 55 S. Ct., 784;
Hale v. Kentucky, 303 U. S., 613, 82 L. Ed., 1050, 58 S. Ct., 753;
Peirre v. Louisiana, 306 U. S., 354, 83 L. Ed.,. 757, 58 S. Ct., 536;
Smith v. Texas, 311 U. S., 128, 85 L. Ed., 84, 61 S. Ct., 164;
Hill v. Texas, 316 U. S., 400, 86 L. Ed., 1559, 62 S. Ct., 1159.

There can be no doubt that where a trial judge intentionally excludes any group of persons from jury service in an attempt to manipulate the jury on some ground which has no relation to their qualifications to serve as jurors raises a question under the equal protection clause when the exclusion is based on race and religion.

It has been held to be a denial of the equal protection of laws under the Fourteenth Amendment intentionally and deliberately to exclude from a jury members of the Roman Catholic faith.

Juarez v. State, 102 Tex. C. R., 297, 277 S. W., 1091.

There were absolutely and intentionally eliminated from the talesmen from which the petitioner's jury was chosen all members of the Catholic and Jewish faith and of the Negro race.

This exclusion was systematic, intentional and deliberate. The trial judge in an attempt to manipulate the selection of a jury which was not truly representative of the community excluded all racial and religious minorities when such minorities constituted thirty percent of the population of the county. This judge on being confronted with an affidavit setting up the exclusion of these groups and with documentary evidence supporting this affidavit not only failed to consider the affidavit and evidence but ordered all of the documentary evidence completely stricken and physically expunged from the record. This was error. This court stated in Carter v. Texas, 177 U. S., 442:

> "While it is error to refuse to hear evidence offered in support of allegations that a jury was improperly constituted."

There can be no doubt in this case that there was a deliberate discrimination against these minority groups, and the judge's action in not considering the proof proffered definitely showed that the discrimination was planned and intentional. As stated in Lane v. Wilson, 307 U. S., 268:

> "The amendment nullifies sophisticated as well as simple-minded modes of discrimination."

This court in Smith v. Texas, 311 U. S., 128, 132, stated:

> "If there has been discrimination, whether accomplished ingeniously or ingenuously, the conviction can not stand."

In this case fifty-five talesmen selected by the trial judge were all of the Protestant faith. It is impossible that "chance and accident alone" could have brought about the exclusion of all members of the minority religious faiths and of the Negro race.

Smith v. Texas, supra, at page 131.

The trial judge in defense of his action in selecting talesmen in this case, ruled that this was a long established method used by the courts in Ohio. This court has stated:

> "the mere fact that procedures for the choice of jury panels are of long standing or are exercised with the best motives will not prevent their invalidation".
> Glasser v. United States, 315 U. S., 60, 86.

There was absolutely no reason for the trial judge to personally select talesmen in this case unless he intended a deliberate manipulation in the selection of the jury

panel. The defense had moved the court six days before the beginning of this trial that all of the panel be drawn from the jury wheel, and the jury wheel had several hundred names in it. Twenty-two jurors were drawn from the jury wheel. Strangely enough a member of the grand jury that returned the indictment was in this panel. A challenge to the array was sustained. Twenty-two additional jurors were then drawn from the jury wheel. Of this number there were five Catholics and one Negro. The court discharged all of them but one Catholic who was peremptorily challenged by the prosecution. Thereupon the court refused to order more names drawn from the jury wheel, but made up a list of his own composed of fifty-five names from which the jury was ultimately chosen. Petitioner strenuously objected to this, and the trial court did not even bother to overrule his objection.

The trial judge had twice prior to the trial of this cause been challenged because of his prejudice and bias towards the petitioner. Eighty affidavits by citizens of the community had been filed charging that the trial judge could not sit in this case in a fair and impartial manner. In spite of all of this, when the judge should have been doubly sure that everything possible was done to show his impartiality, he refused to permit prospective jurors to be drawn from the jury wheel. No excuse can be given for his actions. This was a deliberate and intentional attempt to manipulate the selection of the jury. Petitioner knows and offered proof that all minority religious groups and members of the Negro race were omitted from the group from which the jury was impaneled. He has no way of knowing whether other

groups or classes were likewise eliminated. The action of the trial judge in view of everything that had gone before definitely deprived petitioner of a fair and impartial trial, and the equal protection of the law guaranteed to him by the Fourteenth Amendment. There can be no doubt that petitioner, a member of the Catholic Church, and very active in his religion, was denied his rights under the Constitution of the United States by the deliberate and intentional exclusion of members of his religious faith from the jury panel.

The jury as chosen was in no manner representative of the community. This court stated in Glasser v. United States, 315 U. S., 60, 85-86, with reference to the selection of jurors:

> "And, if exercised must always accord with the fact that the proper functioning of the jury system, and indeed, our democracy itself, required that the jury be a 'body truly representative of the community,' and not the organ of any special group or class."

This court stated in Smith v. Texas, 311 U. S., 128, 130:

> "It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community."

And further:

> "Discrimination to result in the exclusion from jury service of otherwise qualified groups not only violate our Constitution and the laws enacted under it but is at war with our basic concepts of a democratic society and a representative government."

In Juarez v. State, 102 Texas Cr., 2987, 277 S. W., 1091, that court held:

> "In bringing about a violation of the provisions of the Fourteenth Amendment the State cannot do indirectly through its officers or agents that which it could not do directly by legislative acts. If the State should pass a law saying that hereafter no man holding to the Baptist religious faith, or the Methodist religious faith, or to the Roman Catholic religious faith, should ever be permitted to serve on a grand jury in this state, and a party adhering to the religious faith so designated should claim that by such legislative act his rights under the Fourteenth Amendment had been violated, the validity of such a law could never be sustained."

Petitioner was a member of one of the minority groups intentionally and deliberate eliminated. The prejudice to him was direct and violent. Beyond any doubt this discrimination greatly prejudiced petitioner.

SECOND POINT.

The trial of petitioner by a jury selected from talesmen from which all members of the Catholic and Jewish faith and all persons of the Negro race were systematically, intentionally and deliberately excluded, deprived petitioner of due process of law guaranteed to him in the Fourteenth Amendment to the Constitution of the United States.

The decisions of this court have long recognized that a jury "truly representative of the community" is one of the "fundamental principles of liberty and justice which lie at the base of our civil and political institutions." It

has been uniformly held that discrimination against race or religion in the choice of jury panels is improper.

Strauder v. West Virginia, 100 U. S., 303 (1880).

In Glasser v. United States, 315 U. S., 60, this court stated:

> "In all cases the constitutional safeguards are to be zealously preserved for the benefit of the accused."

And further:

> "The guarantees of the Bill of Rights are the protective bulwarks against the breach of arbitrary power."

And in Smith v. Texas, 311 U. S., 128, 130, this court stated:

> "It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community."

This court in a line of recent decisions has very clearly shown that a jury must be drawn from a cross-section of the community and that any discrimination against a minority group violates the due process clause in the Fourteenth Amendment to the Constitution of the United States.

In Glasser v. United States, 315 U. S., 60 this court stated:

> "A jury should not be selected by any process which involves a different intent and purpose than that of being truly representative of the community even if the motives influencing any other selective process are of the best nature and intent."

And:

"And, which exercise must always accord with the fact that the proper function of the jury system, and indeed our democracy itself, requires that the jury be a 'body truly representative of the community', and not the organ of any special group or class. If that requirement is observed, the officials charged with choosing federal jurors may exercise some discretion to the end that competent jurors may be called. But they must not allow the desire for competent jurors to lead them into selections which do not conform with the concept of the jury as a cross-section of the community. Tendencies, no matter how slight, toward the selection of jurors by any method other than a process which would insure a trial by a representative group are undermining processes weakening the institution of jury trial, and should be sturdily resisted. That the motives influencing such tendencies may be of the best must not blind us to the dangers of allowing any encroachment whatsoever on this essential right. Steps innocently taken may one by one lead to irretrievable impairment of substantial liberties."

In Thiel v. Southern Pacific Company, this court stated:

"The American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community. Smith v. Texas, 311 U. S., 128, 130, 85 L. Ed. 84, 86, L. Ed. 680, 707, 62 S. Ct. 457.

This does not mean, of course, that every jury must contain representatives of all the economic, social, religious, racial, political and geographical groups of the community; frequently such complete representation would be impossible. But it does mean that prospective jurors shall be selected by court officials without systematic and intentional exclusion of any of these groups. Recognition must be

given to the fact that those eligible for jury service are to be found in every class of society. Jury competence is an individual rather than a group or class matter. That fact lies at the very heart of the jury system. To disregard it is to open the door to class dissensions and discriminations which are abhorrent to the democratic ideal of trial by jury."

In Ballard v. United States, 67 S. Ct., 261, this court reiterated its holdings in Smith v. Texas, supra, Thiel v. Southern Pacific Company, supra, and Glasser v. United States, supra, and further held:

'But reversible error does not depend on a showing of prejudice in an individual case. The evil lies in the admitted exclusion of an eligible class or group in the community in disregard of the prescribed standards of jury selection."

And:

"The injury is not limited to the defendant—there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts."

This court has continually and rigorously held that the intentional exclusion of any minority group in the selection of a jury panel violates the due process clause of the Fourteenth Amendment to the Constitution of the United States. In the instant case all minority religious groups as well as members of the colored race were systematically and intentionally excluded. No other reason could be given for the trial court's refusal to continue to draw names from the jury wheel.

Petitioner was accordingly denied the due process of law guaranteed to him by the Fourteenth Amendment.

THIRD POINT.

The trial of petitioner before a judge who had openly displayed his prejudice and bias toward petitioner and who was directly interested financially and otherwise in the outcome of the trial and whose right to sit in the trial of the cause had twice been challenged by an affidavit of prejudice and bias deprived petitioner of due process of law as guaranteed to him in the Fourteenth Amendment to the Constitution of the United States.

The trial judge in this cause and the prosecuting attorney, petitioner herein, had for a long period of time been dealing at arm's length because the judge was not satisfied with the way the prosecutor's office was operated and because petitioner had threatened, and was attempting, to obtain an indictment against a corporation in which the trial judge was financially interested. Petitioner had absolute evidence that the corporation was engaged in a lottery which was in violation of state gambling laws. He had attempted to bring this evidence of violation of state gambling laws before a grand jury, which action greatly angered the trial judge and was directly responsible for the prejudice and bias displayed by the trial judge before the trial of this cause, during the trial and after the trial.

In this case the trial judge was the accuser. He appointed the special prosecuting attorney to carry out his accusation and obtain an indictment against petitioner; worked with the special prosecutor in preparing the case; obtained state highway patrol officers to aid said

prosecuting attorney; sat in the trial of this cause, and even selected the talesmen who were to comprise the jury panel.

In Sharkey et al, Police Commissioners v. Thurston, 268 N. Y., 123, it is stated:

> "It is a fundamental rule of our common law, embodied in the Constitution of our state and nation, that no person may be adjudged guilty and punished upon a charge of wrongful conduct. Decisions must await the hearing of the defense. The cause may not be prejudged, and no man may be both the accuser and judge. Otherwise a hearing becomes a fiction, and no fiction can destroy constitutional guarantees."

At the instigation of the trial judge and the special prosecuting attorney appointed by him, the court's action in obtaining an indictment against petitioner and all of the various matters leading up to the trial were given great publicity. It was a matter of public knowledge that this cause resulted from the direct action of the trial judge. Any verdict other than guilty in this case would have greatly embarrassed the trial judge because of his direct actions in this matter and further because of the great publicity given to his interest in this cause.

It is interesting to note that in spite of the fact that petitioner twice challenged the trial judge's right to hear this cause by affidavits of prejudice and bias, the trial court nevertheless continued throughout the trial of this cause to show that he was indirectly interested in obtaining a verdict of guilty. In spite of the fact that his right to sit as a fair and impartial judge had been so challenged, he would not protect petitioner's rights by hav-

ing a jury drawn from the jury wheel. He made no rulings in this case which would in any way tend to cast aside the prejudice and bias with which he had been charged.

Petitioner herein had twice gone before the Chief Justice of the Ohio Supreme Court and in open hearings made very grave accusations against this trial judge. These hearings were long and the accusations made therein were serious, and great publicity was given to the testimony offered. Petitioner had made many other grave charges against the trial judge which were publicized in the local press. For a trial judge to sit in a cause after he had been so accused, in and of itself, shows that he must have had a very direct interest in the case, otherwise he would have stepped aside for a visiting judge, and thus definitely and clearly vindicated himself of any charge of prejudice and bias.

As pointed out, supra, the trial court at the very inception of the trial, disclosed a studied determination to eliminate jurors who were members of minority religious and racial groups who had been drawn from the jury wheel. He then refused to draw further names from the jury wheel, but personally designated fifty-five talesmen from whom the jury was selected. He intentionally, systematically and deliberately eliminated all members of minority religions and races. This, petitioner contends, was a direct result of his prejudice and bias toward petitioner.

The trial judge had a very substantial financial interest in the outcome of this trial. He was a stockholder, director and vice-president of a corporation which was

carrying on a very lucrative lottery in his jurisdiction. Petitioner was attempting to obtain an indictment against this corporation for said gambling operations and had he been able to present this evidence to the grand jury, the judge would have sustained great financial loss. Petitioner's indictment and conviction precluded him from carrying on with this attempt to have the judge's corporation indicted.

In Whittaker v. McLean, 118 Fed. (2nd), 596, the court said:

> "A right to be tried by a judge who is reasonably free from bias is a part of the fundamental right to a fair trial. If before a case is over, a judge's bias appears to have become over-powering we think it disqualifies him."

The trial judge's prejudice and bias in this case was so strong that when confronted with documentary evidence in support of petitioner's contention that the jury had been improperly selected, the trial judge ordered all this evidence stricken from the record, and in his opinion attempted to justify his actions on the ground that if potential jurors were investigated such action would deter honest and honorable people from sitting on future juries.

This court has held that a financial interest in the outcome of a cause is enough to justify the removal of a trial judge. Tumey v. Ohio, 273 U. S., 510. Here we not only have a financial interest, but also a great political interest, as well as prejudice and bias, which the record clearly shows became almost uncontrollable as the trial of this cause proceeded.

CONCLUSION.

The judgment appealed from should be reversed.

Respectfully submitted,

PAUL M. HERBERT,
ROBERT E. TEAFORD,
FRANK L. NEVIUS,
Counsel for Petitioner.

AARON J. HALLORAN,
Of Counsel.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM 1946.

JEROME A. NEVIUS,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

MOTION.

Now comes petitioner and petitions this court for an order dispensing with the printing of the record in this cause for the reason that said petitioner owns no property; has no savings or income and is dependent upon his friends and relatives for the funds to appeal this cause.

Wherefore, petitioner petitions for the granting of an order dispensing with the printing of the record in this cause.

PAUL M. HERBERT,
ROBERT E. TEAFORD,
FRANK L. NEVIUS,
Counsel for Petitioner.

AARON J. HALLORAN,
of Counsel.

INDEX.

Statement of the case..... 1
The questions raised..... 4
Facts as to jury selection..... 4
Facts as to alleged bias and prejudice of the trial judge..... 10
Argument..... 16
The jury question..... 16
The question of bias and prejudice..... 18
Brief in opposition to motion to dispense with printing of the record..... 20
Appendix A—Opinion of trial court on motion for arrest of judgment and for a new trial..... 22

Authorities Cited.

Glasser v. U. S., 315 U. S., 60.....8, 16
McHugh v. State, 38 O. S., 153, 155..... 17
McHugh v. State, 42 O. S., 154..... 17
G. C. 11419-46..... 4
G. C. 11419-48.....5, 17

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 1315.

JEROME A. NEVIUS,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI AND TO MOTION TO DISPENSE WITH PRINTING OF THE RECORD.

STATEMENT OF THE CASE.

PROCEEDINGS BELOW.

Petitioner Nevius was the prosecuting attorney of Clark county, Ohio (R., 172). He was indicted by the Clark county grand jury jointly with Joseph Parisi and Ralph Schear, alias "Cookie" Schear, for accepting bribes

from Parisi and Schear who were the proprietors of a gambling house (The Silver Dollar) theretofore operated in Clark county (R., 1, 28, 172). A severance was ordered and Nevius was tried alone (R., 46, 172).

As stated in the opinion of the Supreme Court of Ohio,

> "The jury had before it evidence to sustain the conclusions:
>
> "(1) That Nevius, the prosecuting attorney, not only knew Parisi, Schear and Thomas, but was on good terms with them, especially Parisi.
>
> "(2) That Nevius knew that Parisi, Schear and Thomas were gamblers who were openly conducting the gambling house known as the Silver Dollar.
>
> "(3) That the Silver Dollar gambling house was located in Clark county.
>
> "(4) That Nevius, the prosecuting attorney of Clark county, made no attempt to suppress the open gambling conducted at the Silver Dollar.
>
> "(5) That Nevius visited the Silver Dollar two or three times a month for a period of more than a year. Parisi, Schear or Thomas was usually at the Silver Dollar at the time of such visits.
>
> "(6) That Nevius lived beyond his means and had excess expenditures over his income of more than $12,000 during the period from January 1, 1941, to June 30, 1944.
>
> "(7) That the money for such excess expenditures came from Parisi and/or Schear and was accepted by Nevius to influence him with respect to his official duties as prosecuting attorney of Clark county.
>
> "(8) That the acceptance of such money took place in Clark county, Ohio" (R., 180, 181).

It is to be noted that this gambling enterprise yielded annual revenues of nearly a million dollars for each of the years 1941 to 1944, inclusive (R., 465-466).

The first, third and fifth counts in the indictment charged Parisi and Schear with giving the bribes, while the second, fourth and sixth counts charged Nevius with accepting bribes (R., 1, 28, 172). The second and fourth counts charged him with accepting automobiles and the sixth count charged him with accepting large sums of money, all with the intent to influence him with respect to his official duty as the duly elected, qualified and acting prosecuting attorney of Clark county, Ohio (R., 1, 28, 173).

The jury found Nevius guilty of bribery on all three counts, that is, the second, fourth and sixth counts of the indictment (R., 80, 173).

Petitioner took his case to the Court of Appeals which ordered him discharged and dismissed on the second and sixth counts of the indictment and remanded the cause for new trial on the fourth count (R., 137, 173). From this judgment of the Court of Appeals the state took the case to the Supreme Court of Ohio which reversed the Court of Appeals and affirmed the trial court as to the sixth count (the money count) but discharged the defendant on the other counts, on the second count for want of proof and on the fourth count for lack of venue, the evidence indicating that the automobile referred to in that count as given to Nevius by Parisi was delivered to him in a county other than Clark county (R., 175, 194, 195). As stated in the opinion, the court would have been justified under the evidence to have committed him to await a warrant for his arrest in such other county (R., 176, Section 13442-6, General Code of Ohio).

Petitioner filed in the Supreme Court of Ohio an application for rehearing (R., 192) which was denied (R., 168). Thereafter petitioner filed in this court his petition for a writ of certiorari and a typewritten transcript of the records and proceedings in the courts below. With his petition for a writ of certiorari he filed a motion to dispense with the printing of the record.

THE QUESTIONS RAISED.

The brief of petitioner carries (pp. 23-26) his "Specification of Errors" and these present two questions. Specifications 1(a), 1(b) and 4 have to do with the alleged exclusion of certain racial and religious groups from the jury, and the remaining specifications relate to the subject of alleged bias and prejudice of the trial judge. These two questions are referred to in the petition (p. 19) as the two main questions presented here. We believe they comprise the only questions presented.

FACTS AS TO JURY SELECTION.

We confine ourselves to the record. At the same time, as a duty to this court and to the state of Ohio, we find it necessary to point out some of the matters wherein petitioner strays from the record.

We take up first the record showing on the subject of jury selection.

The statutory procedure presented in the General Code of Ohio was strictly followed by the trial judge:

> "Sec. 11419-46. Talesmen summoned, when. When, by reason of challenge or other cause, enough jurors summoned as aforesaid to make up

the panel, either of the grand or petit jury, are not present, or if the array be set aside, the sheriff shall summon talesmen until the deficiency is made up, or, if the number for a grand jury is insufficient, the court may issue a special venire to the sheriff, commanding him to summon the persons named therein, to attend forthwith, as grand jurors.

"Sec. 11419-48. Selection of talesmen on motion of either party.

When it is necessary to summon talesmen, the court, on the motion of either party, shall select them, and cause to be issued immediately a venire for as many persons having the qualifications of a juror as, in the opinion of the court, may be necessary, which persons shall be required to appear forthwith, or at such times as may be fixed by the court; but no person known to be in or about the court house shall be selected without the consent of both parties."

When it appeared, from time to time, that it would be necessary to summon additional talesmen in order to complete the panel, the state, on motion, exercised its statutory right to require the trial judge to select them (Section 11419-48, supra, R., 57, 62, 66).

Before exhausting his peremptory challenges the petitioner waived examination of any specific juror for cause and, reserving no exceptions, unqualifiedly accepted the jury as satisfactory to him. We quote from the record (R., 210-211):

"By the Court: Is there any further examination for cause at this time?

Mr. Corry: The state accepts the jury.

Mr. Herbert: The defense is satisfied with the jury.

By the Court: So that there will be no misunderstanding, the state passes any further examination

for cause of any specific juror or the whole panel, and any additional peremptory challenge? And the defense passes any further examination of any specific juror for cause?

Mr. Herbert: Yes.

By the Court: And the defense accepts the jury, and passes the exercise of their remaining peremptory challenge?

Mr. Herbert: The defense is satisfied with the jury.

By the Court: Is there any reason known to either side why the jury as now seated should not be sworn in this case?

Mr. Herbert: No reason.

Mr. Corry: We have no reason.

By the Court: Is there any juror seated in the jury box who has not been a resident of the state of Ohio for one year?

(No answer.)

By the Court: Is there any juror in the jury box who is not a resident of Clark county, Ohio?

(No answer.)

By the Court: Is there any juror who is not at least twenty-one years of age?

(No answer.)

By the Court: The clerk will now swear the jury as impaneled.

Jury sworn."

After the jury found petitioner guilty he then, for the first time, complained of the manner in which the jury was constituted. This he did by filing, at the time of hearing of his motion for a new trial, his own affidavit, to which he had attached numerous reports obtained by him from a local credit bureau, having reference to the race, religion and other characteristics of the jurors

summoned for service (R., 89-90). His affidavit was as follows:

"Jerome A. Nevius, being first sworn, deposes and says that the documents hereto attached are reports furnished in the usual course of business by the Retail Credit Bureau of the city of Springfield, Ohio after investigation of those called for jury service in the trial of Jerome A. Nevius in the above entitled action.

"Affiant further says that the first forty-four (44) of said reports are on those citizens of Clark county, Ohio, who were summoned through the jury wheel and that the balance of said reports are on those citizens of Clark county, Ohio, who were summoned by order of the judge of the Court of Common Pleas of Clark county, Ohio, thereafter.

"Affiant says that all of said jurors not summoned by operation of the jury wheel are native born citizens, members of the Caucasian race, from which groups members of two minority religious groups, to wit, Catholic and Hebrew, have been excluded, and that said exclusion affects approximately fifteen percent (15%) of the population of the said Clark county, Ohio, and that the exclusion of races other than the Caucasian race excludes from such jury service approximately an additional fifteen percent (15%) of the citizens of said Clark county, Ohio."

The state moved to strike from the files this affidavit with its attached credit bureau reports upon jurors summoned for service (R., 103). The grounds of the motion were:

"(1) Said affidavit and reports attached thereto are immaterial, irrelevant and scurrilous.

"(2) The reports attached to said affidavit are based solely upon hearsay information and are incompetent evidence to support the motion for a new trial.

"(3) Neither the defendant nor the plaintiff interrogated or challenged the jurors with respect to their race or religion, nor did the defendant challenge the array, nor exercise all of his peremptory challenges, and the defendant accepted said jury without reservation.

"(4) The defendant and his counsel were furnished with the reports of the Retail Credit Bureau of the city of Springfield, Ohio prior to their examination of the qualification of jurors and prior to their acceptance of the jury and the presentation of the reports in connection with said affidavit filed in support of the motion for a new trial does not constitute newly discovered evidence and the defendant is estopped from questioning on the motion for a new trial, the qualification of said jurors.

"(5) Other grounds appearing upon the face of the record."

Petitioner says (Petition, p. 11) that this affidavit and the reports proffered with it were tendered following this court's opinion in **Glasser v. U. S.**, 315 U. S., 60, but in that case, to which we shall hereafter refer, the opinion of the court was that the affidavit of the defendant alone, alleging the improper constitution of a jury, even though uncontroverted, is not enough.

The motion to strike was, except as to striking the affidavit itself, sustained (R., 104).

The motion for a new trial and in arrest of judgment was also overruled (R., 104). The opinion of the trial court on this motion is so well considered, especially in relation to this subject of the jury selection, that we attach it hereto as "Appendix A". We note particularly his statement that:

"The court does not know at this moment and never has known the racial lineage or religious faith

> of any members of this jury, or any other jury which has served in this court. Such matters are never inquired about by either the attorneys or the court in examining jurors, and in no jury trial in which Mr. Nevius took part has the court ever heard him make such an inquiry."

The petitioner, however, was possessed of the credit bureau reports and in his petition he volunteers the information that among the last twenty-two names drawn from the jury wheel there were five Catholics and one Negro (Petition, p. 11).

It is to be noted in passing that the record, and even the affidavit of petitioner heretofore set forth, failed to show that the petitioner falls in either of the excluded classes of race or religion referred to in his affidavit. Nor does the record show that the question of race or religion entered into the case in any manner until injected by petitioner in connection with his motion for a new trial.

Nothing is found in the record to support the allegations of petitioner (Petition, p. 11) that he is a Catholic, very active in his church, that years ago in Clark county strong feeling was aroused against members of the Catholic faith and other minorities and the colored race, and that this feeling is still present. The inclusion of the foregoing material in the petition is an inexcusable effort on the part of the petitioner to supply, **dehors** the record, a significant deficiency therein.

This matter of racial and religious discrimination was not made one of the assignments of error by the petitioner in taking his case to the Court of Appeals (R., 123). There was, however, an attempt to again revive

it in the application of the petitioner for a rehearing after the Supreme Court of Ohio had rendered its decision and on this application for rehearing it was, for the first time, expressly claimed as a deprivation of the rights of the petitioner under the provisions of various amendments to the Constitution of the United States (R., 196).

The application for rehearing was denied (R., 168) and this closed the record in the state courts as to the complaint of jury discrimination, which record was in fact closed by the petitioner himself when, with full possession of information received from private sources as to the qualifications of the jurors, he accepted the jury without reservation.

FACTS AS TO THE ALLEGED BIAS AND PREJUDICE OF THE TRIAL JUDGE.

In his "Specifications of errors" (Petition, pp. 23-26) the petitioner not only claimed bias and prejudice on the part of the trial judge in the jury selection (the facts relating to same being hereinbefore set forth) but also claimed that his conduct and rulings indicated bias and prejudice. The facts involved are set forth below in the same order in which they appear in the "Specifications of errors".

Specification 1(c)—Bias is claimed to be shown by the refusal of the trial judge to order the prosecution to furnish petitioner with a bill of particulars, especially respecting the money count (Petition, pp. 24, 8). A bill of particulars was furnished showing the state expected to prove money bribes of approximately $7,500.00 (R.,

37). Furthermore, there was furnished to the petitioner and his counsel all books, documents and papers, instruments of writing of any kind and all types whatsoever, which the state expected to use as a part of its case or as a basis of its evidence in the trial, in so far as any such material was in the possession of counsel for the state or under their control, or otherwise available to them, and permitted the defendant and his counsel to make copies of same (R., 102).

In the same specification the petitioner also claimed bias in that there was no charge of conspiracy alleged in the indictment, although the element of conspiracy was introduced in evidence. In Ohio there is no criminal offense of conspiracy. In the case at bar the question of conspiracy was only pertinent as a rule of evidence (R., 185-185(A)).

Specification 1(d)—Bias is claimed in that the trial judge refused to grant a hearing to the petitioner before finding that he was under disability which precluded him from performing his official duties (Petition, p. 25). The question of the determination of the disability of the prosecutor was a ground set forth in the plea in abatement (R., 19). The state filed a reply to the plea (R., 22-29). The plea in abatement was heard before Judge Richard L. Cameron, common pleas judge of Union county, Ohio, and not heard by the trial judge. The petitioner's contention was found to be without merit (R., 36).

Specification 1(e)—Bias is claimed in that the trial judge had conferences with attorneys for the prosecution and secured two members of the highway patrol to

interview witnesses. The members of the highway patrol were assigned to the prosecution by Frank L. Lausche, governor of the state of Ohio, and they were directed to report, not to the trial judge, but to Mr. Leis, who was conducting the grand jury investigation and the prosecution of this and other cases of corruption in Clark county (R., 906, 19, 22-29).

With references to conferences with attorneys all that is shown is that Mr. Leis kept some papers in the office of the judge until a room was available for him (R., 919).

In the same specifications of errors reference is made to the trial judge conducting hearings wherein witnesses were sworn to give testimony against the petitioner after the indictment was returned and without notice to the petitioner. Apparently there was only one such instance, that of Rupert Wissinger, who was so subpoenaed and examined (R., 897). The trial judge did not know the subpoena was going to be issued, nor did he conduct the hearing, nor was he given any information as to who the witness was nor the purpose of the examination, but was merely informed by Mr. Leis that the witness would be examined in the manner provided by law (R., 901-903).

The grand jury was still in session but apparently was not available on that particular day (R., 901). The witness was again called at the time of trial and the petitioner was afforded full opportunity to cross examine and did cross examine the witness. The witness was called merely to produce records giving information that was already in the possession of the petitioner, being the loan account of himself and his wife (R., 899), which record was introduced at the trial and testimony taken upon both direct and cross examination.

Specification 1(f)—Bias is claimed to be shown by the fact that petitioner's motion for severance filed on January 25, 1945, was not passed upon until the day of commencement of trial, thereby denying petitioner reasonable opportunity to prepare his defense (R., 21, 46, 47). No exception was taken to the delay nor was any application made for a continuance. This consent of the court to a severance was a most conspicuous evidence of fairness, if not even of favoritism, of the trial judge toward the petitioner.

Specification 2—This specification carries the wholly unfounded allegation that it was established at the hearing upon the affidavit of prejudice that the trial judge had a financial interest in securing a conviction of the petitioner and that the trial judge was an important participant in a gambling syndicate and feared a grand jury investigation (Petition, p. 26). The trial judge stated at the hearing before the chief justice of the Supreme Court of Ohio that he was a stockholder and an officer in a theater company, a half-interest in which was owned by two other companies, one of which was Warner Brothers of New York (R., 907-908). He further stated that the general manager of the company in which he was a stockholder was, by virtue of its regulations, under the supervision and control of Warner Brothers (R., 910-911). The trial judge stated that he had at times seen in front on the marquee a reference to a feature of the program referred to as "Bank Night", the character of which feature was not in any manner disclosed by the record (R., 908-910).

In related connections but at other places in the petition we find such other most reckless departures from

the record as those comprising the following allegations; that "the trial judge himself admitted that he had a pecuniary interest in the outcome of the trial"; that he was an officer in a corporation "which maintained and carried on a highly lucrative gambling lottery"; that in this lottery "the trial court was active"; that its suppression "would further have resulted in substantial pecuniary loss to the trial judge" (Petition, p. 5).

These unfounded inferences were justly criticized by the chief justice of the Supreme Court when upon finding that the affidavit of petition that the contention of bias and prejudice was without foundation he stated that in cases of this sort much feeling is engendered and it is easy for the parties themselves, as well as their counsel, to draw inferences that later their more sober judgment would indicate were probably without foundation (R., 958). In concluding the hearing the chief justice stated:

> "I say to Mr. Nevius, and all of counsel, that in my judgment that this evidence here today falls far short of being the substance that is necessary to unbench a judge. Of course, all of us agree that it is important for every litigant in a civil or criminal case, to have a fair and impartial hearing. It has been said that it is not enough for a litigant to simply have that impression when he doesn't have a sufficient basis in fact. It should be remembered, too, by the prosecutor here, that this case to be tried is not a case in which this judge will sit as a decider or a judge of the facts, those require submission to the jury, and surely the prosecutor will remember that the questions of law upon which the judge will rule, as well as the admissibility of the evidence, are questions that can be reviewed, not only by the

Court of Appeals, but by this court. And for whatever satisfaction it may bring to Mr. Nevius and his counsel, I have no hesitancy in saying to them, that in overruling this affidavit of bias and prejudice here today, I am in no wise indicating what my attitude as one of the seven members of this court should be, if there should be a conviction and this case should come here for review. The questions of law that necessarily would be raised in a record of that kind are something that are entirely different from the determination of the facts on the question of bias and prejudice for determination here today" (R., 959-960).

Each complaint made in the specifications of errors related to rulings of the trial judge which were carried to the Supreme Court of Ohio, and the rulings of the trial judge were in each instance affirmed by the Supreme Court of Ohio. To say now that correct rulings of the trial judge and of the chief justice himself on the affidavits of prejudice constitute a showing of bias and prejudice on the part of the trial judge would be to transfer that same charge of bias and prejudice to the chief justice and to the members of the Supreme Court of Ohio.

ARGUMENT.

The Jury Question.

There is nothing at all in the record relative to the race or religion of any juror. The foregoing statement presumes that there had properly been stricken from the record the hearsay reports of a local credit bureau relative to jurors, which reports were attached to the affidavit of the petitioner filed on the hearing of the motion for a new trial.

The hearsay character of these reports, obtained from undisclosed sources, is fully discussed in the opinion of the trial judge rendered upon his overruling of the motion for a new trial, which opinion is set forth fully in "Appendix A", hereto attached.

In the case of **Glasser v. United States**, 315 U. S., 60, this court has held that on a motion for a new trial a claim of discrimination in the manner of selecting the jury is not sufficiently supported by an affidavit of the one convicted. In that case, after trial, and on a motion for a new trial, Glasser set forth his affidavit that all the names of women placed in the box from which the panel was drawn were taken from a list furnished the clerk of the court by the Illinois League of Women Voters, and that others were systematically excluded, by reason of which he did not have a trial by a jury free from bias. The source of his information was stated to be a then current article in the American Bar Association Journal. In the opinion in this case it was stated that on the record the petitioner's showing was insuffi-

cient; that it was incumbent on the moving party to introduce, or to offer, distinct evidence in support of the motion; that the formal affidavit alone, even though uncontroverted, is not enough; that the record was barren of any actual tender of proof or proof that the court refused to entertain any such offer, and that this failure of petitioner was fatal.

If this motion had not been overruled, and if the reports made by the credit bureau relative to the religious faith of each person named in the three special venires which the trial judge issued from time to time as more names were found to be needed to fill the jury, had not been stricken from the file, still nothing appears in the record to indicate any systematic, intentional or deliberate effort to manipulate the jury. The first forty-four jurors were regularly drawn from the wheel and the remaining fifty-five jurors included in the three special venires were selected by the judge on motion of counsel for the state, made under the provisions of Section 11419-48, General Code of Ohio, heretofore set forth in our statement of the case. It was not within the discretion of the judge to refuse to himself summon talesmen upon motion by either party.

McHugh v. State, 38 O. S., 153, 155;
McHugh v. State, 42 O. S., 154.

It further appears from the information voluntarily furnished by petitioner (Petition, p. 11) that in the twenty-two names of jurors drawn from the jury wheel there were five Catholics and one Negro. Except for the affidavit of petitioner there is no showing of the composition of the balance of the venire.

The question of deprivation of rights on the basis of racial or religious prejudice is not only upon this record a question that is not substantial but more than that it is one that has no foundation at all in the record. The question was not raised in the manner shown in the many cases cited by petitioner in his brief relative to the selection of jurors, which cases show in all instances that the question was raised either at the very inception of the case in challenging the array of grand jurors, or in examining and challenging jurors being impaneled at trial, or in challenging the array at the conclusion of the examination on **voir dire**, or in asserting the deprivation of constitutional rights throughout the proceedings had with respect to the trial.

This failure to do so is particularly controlling in this instance inasmuch as the petitioner had all of the information with reference to the jurors during the course of examination and before the jury was accepted and sworn, which acceptance by him was without reservation or exception (R., 210-211).

The Question of Bias and Prejudice.

We have heretofore commented upon the fact that the specifications of errors relate to matters determined against the petitioner by the Supreme Court of Ohio, which court affirmed the rulings of the trial judge upon those matters. The petition for a writ of certiorari cannot be converted into an error proceeding.

To claim that rulings of the Supreme Court of Ohio supporting the trial judge constitute evidence of bias and prejudice on the part of the trial judge is also to charge such bias and prejudice to the members of the

Supreme Court of Ohio who affirmed the action of the trial judge in making these rulings.

The Supreme Court of Ohio determined that the petitioner was accorded a fair and impartial trial, the court stating that:

> "It is our opinion that the jury had before it evidence which justified the jury in returning a verdict of guilty on the sixth count in the indictment. We are of the further opinion that it does not affirmatively appear from the record that the accused was prejudiced or prevented from having a fair trial" (R., 194).

As the facts of record are not sufficient to raise any substantial question of deprivation of any constitutional right of petitioner we do not undertake to present unnecessary argument, being fully convinced that upon this record the petition for a writ of certiorari should be denied.

Respectfully submitted,

STANLEY N. HUSTED,
Prosecuting Attorney of Clark County, Ohio.

SIMON L. LEIS,
Special Assistant Prosecuting Attorney.

HOMER C. CORRY,
STEWART L. TATUM,
Attorneys for Respondent, State of Ohio.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1946.

JEROME A. NEVIUS,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

BRIEF IN OPPOSITION TO MOTION TO DISPENSE WITH PRINTING OF THE RECORD.

The petitioner has moved the court for an order dispensing with the printing of the record for the stated reason that petitioner owns no property; has no savings or income, and is dependent upon his friends and relatives for the funds to appeal this cause. Respondent, in order to avoid further delay in the final determination of this case, files its brief in opposition to the petition for a writ of certiorari.

In doing this we make full reservation of our right, if the case is to be considered further by this court, to refute the grounds stated in the motion, which grounds are unsupported by affidavit, and the right to ask for the printing of the record at the cost of petitioner, or, if he

makes a showing in forma pauperis, then at the expense of the government.

Respectfully submitted,

STANLEY N. HUSTED,
Prosecuting Attorney of Clark County, Ohio.

SIMON L. LEIS,
Special Assistant Prosecuting Attorney.

HOMER C. CORRY,

STEWART L. TATUM,
Attorneys for Respondent, State of Ohio.

APPENDIX A.

Opinion of Trial Court on Motion for Arrest of Judgment and for a New Trial.

Davis, J.:

This matter is now before the court for disposition of two motions filed by the defendant, Jerome Nevius.

One is a motion in arrest of judgment, and the other a motion for a new trial.

The court can follow either of two courses in disposition of such matters. It can simply announce its ruling and sign the court order, or it can give a written opinion as part of its decision.

This case, and some matters involved in these motions are of such a nature that the court prefers to use a written decision.

Early in the summer of 1944 two actions were filed in this court seeking to recover money alleged to have been lost in a gambling place described as the Silver Dollar.

At that time this defendant, Jerome Nevius, was prosecuting attorney of Clark county, and as such an officer of this court, and one Niles Young was sheriff of Clark county, and also as such an officer of this court.

In these two civil suits, each of these officials were made defendants and charged with having an interest in this gambling establishment and permitting its operation in this county in which they were law enforcement officers.

This in substance amounted to a charge of corruption in public office against these two defendants.

A situation was thus created which, in the opinion of this court, required investigation as part of its official duties, and in justice to these public officials.

A court is not required to, and never does investigate such matters itself, but relies upon the proper officials and the use of a grand jury for such purpose.

Ordinarily the prosecuting attorney and the sheriff would be the proper officials to start and conduct such an investigation.

However, in this instance, these were the two officials who were made defendants in the civil actions and of course, it would be inconsistent to expect an official to investigate himself. It seemed desirable that such investigation be conducted by an out-of-town investigator, who would be free from the influence of politics, personalities or other things of a local nature.

The court, therefore, with the consent and approval of the board of county commissioners of this county, procured the service of Simon Leis of Cincinnati, Ohio, and appointed him for this purpose.

A grand jury was impaneled and sworn and the matter was then turned over to Mr. Leis and this grand jury, by the court.

As a result of this investigation and the evidence which was brought before the grand jury, indictments were returned by this grand jury against five persons, one of whom was this defendant, Mr. Nevius.

Thereafter some proceedings were had which pertain to judicial procedure and which have no bearing upon the matter now before the court as they have already been heard and disposed of in the usual course of procedure.

On the nineteenth day of June, 1945, this defendant, Jerome Nevius, was placed on trial before a jury in this court, having been granted a separate trial at his own request, from his two co-defendants, Joseph Parisi and Ralph Schear.

On July 7, 1945, the jury returned a verdict finding him guilty of all three of the offenses with which he was charged by the grand jury.

This court had no personal interest in the investigation and trial other than what any public official or citizen would naturally have. The acts which the court performed were judicial duties as required by law, and it was not necessary to form any opinion as to the guilt or innocence of any defendant. That was left entirely to the jury. However, since the grand jury brought these charges of bribery against this defendant and since the trial jury has declared by a unanimous verdict that they were convinced beyond a reasonable doubt of his guilt, their findings must be given the weight which the law says they shall receive.

The motion in arrest of judgment is based upon an allegation that the offense charged is not within the jurisdiction of the court.

In support of this motion two affidavits have been filed by a civil engineer and surveyor, in which he alleges that since this trial he has made further investigation and now finds that the Silver Dollar building is located in Greene county.

This affiant testified for the defense during the trial and could have given this additional testimony at that time if it had been available to him.

The defendant was discussing the county boundary line at this point with the county commissioners a year ago.

He was indicted by the grand jury more than six months before his trial. This additional evidence was available at all times and it would seem could have been found as easily during six months before trial as it has been in less than one month after the trial.

If a judgment is to be arrested or a case tried over for the reason that a witness states he can add to, qualify or change his former testimony, then many cases would obviously have to be tried more times.

Moreover, as convincingly argued by counsel for the state, if this defendant accepted bribes for permitting the "numbers" gambling to be operated all over the county without interference, it is not important or material where the headquarters of the gambling operations were located.

The motion in arrest of judgment is therefore overruled.

The motion for a new trial alleges all of the six causes or grounds specified in the statute. However, some of them were not argued or the attention of the court directed to them, so the court assumes they were not seriously considered by the defense and they will therefore be passed without comment.

The substance of this motion is that the defendant did not have a fair trial and his substantial rights were thereby materially affected.

Some affidavits by spectators have been filed to the effect that one of the jurors fell asleep while the trial was in progress. This claim is not an unusual occurrence. It

has happened in many trials and has occurred in former trials in this court. The decisions of other courts are practically all to the effect such an incident is not ground for a new trial, if the unsuccessful party having knowledge of it failed to call the attention of the court thereto and ask proper relief.

In this case the juror referred to was seated a few feet away from the defendant and his counsel and much closer to them than to counsel for the state or the judge.

It seems reasonable for this court to assume that anything unusual about this particular juror would have been observed by the defendant or one of his two counsel, a few feet away, as easily as by spectators in other parts of the court room.

The defense, of course, is under the same duties as counsel for the state or the judge in assisting in the procedure of a fair trial.

The theory of the decisions is that it is humanly impossible to prevent one or more of a group of persons from becoming drowsy under circumstances and conditions which tend to affect them in that way.

In this case an alternate or thirteenth juror was available in the event any of the regular jurors might become incapacitated.

The court is of the opinion therefore, that a new trial could not be granted upon this ground.

Only one more point which has been presented under this motion remains to be considered. It is raised by an affidavit filed by the defendant Jerome Nevius, himself, and alleges in substance that the members of the jury before which he was placed on trial, and a group of other persons who were summoned for jury service were

members of the Caucasian race, and not of the Catholic or Hebrew religious faith. No competent proof is offered in support of this allegation. The court does not know at this moment and never has known the racial lineage or religious faith of any members of this jury, or any other jury which has served in this court. Such matters are never inquired about by either the attorneys or the court in examining jurors, and in no jury trial in which Mr. Nevius took part has the court ever heard him make such an inquiry.

The reason such questions are never asked are well known. This is a country of racial and religious freedom and such things have no bearing upon the qualifications of jurors. The law simply provides that they shall be "judicious and discreet persons having the qualifications of electors of such county." If every minority race and each religious group must be represented upon a jury before it can be said a fair trial was had, it is doubtful if a jury of one hundred people would be large enough to meet the test. The fact that the attorneys in this case and the court have been unable to find even one case among all the reported cases in this country, in which the question of religion has been suggested in connection with a juror's qualifications, indicates how absurd and distasteful it is.

The court shares the opinion of people generally that religion is the sacred link between human beings and their God and not something to be dragged along the trail of a criminal trial. Such tactics become even more distressing when persons subject their own religion to such inconsideration.

But as already indicated, the basic question is: Did the defendant have a fair trial before a fair and impartial jury? Apparently the claim is not made that this jury was not fair and impartial. If such a charge were now made, it would not be consistent with the feelings expressed by the defense just before the jury was sworn, as shown by the following excerpt from the stenographic record.

"By the Court: Is there any further examination for cause at this time?

Mr. Corry: The state accepts the jury.

Mr. Herbert: The defense is satisfied with this jury.

By the Court: So that there will be no misunderstanding—the state passes any further examination for cause of any specific juror or the whole panel, and any additional peremptory challenge? And the defense passes any further examination of any specific juror for cause?

Mr. Herbert: Yes.

By the Court: And the defense accepts the jury, and passes the exercise of their remaining peremptory challenge?

Mr. Herbert: The defense is satisfied with the jury.

By the Court: Is there any reason known to either side why the jury as now seated should not be sworn in this case?

Mr. Herbert: No reason.

Mr. Corry: We have no reason.

Jury sworn."

If the defense now means to suggest that the members of this jury were not qualified to serve or were not mindful of their oath and duties, it is a base and unwarranted accusation. Or if they mean to suggest that members

of another racial lineage or religion would have disregarded evidence and law for the purpose of helping the defendant, even though he were proven guilty, it is an equally base accusation made without justification or respect.

The members of the grand jury which presented these charges against this defendant were under the same oath that is administered to all grand juries, and the evidence presented to them was by witnesses under oath.

The members of the trial jury which returned this verdict were under the same oath to faithfully and impartially perform their duties, as all trial juries are. They heard and saw all the evidence in the case as offered by witnesses who were also under oath, and after all the evidence had been presented to them they returned a unanimous verdict that the guilt of the defendant had been proved beyond a reasonable doubt.

Both the grand jury and the trial jury were instructed, in substance, as all juries are, that they must not allow any religious, political, social, or personal feelings or bias to affect or enter into their deliberations.

The court is firmly of the opinion that the defendant had a fair trial before a fair and impartial jury, and one which defense counsel stated they were satisfied with before the jury was sworn.

The motion for a new trial is also overruled.

There still remains to be considered the motion of the state to strike from the record the above mentioned affidavit of Jerome Nevius, together with the papers attached to it.

This motion is based upon several grounds, among them that it is in its nature scurrilous, incompetent and

irrelevant; also that the statements made therein are based upon hearsay, and several other grounds.

The papers attached to this affidavit consist principally of reports made by a credit bureau as to each of approximately one hundred people who had been summoned to report as jurors during the progress of this trial.

These reports undertake to cover not only the present status, but the past history of these prospective jurors. They express opinions of the credit bureau which are not made under oath and which on their face show that such opinions are based upon information given the credit bureau by so-called "informants" who are not disclosed, and who in turn have expressed their opinions to the credit bureau. These opinions purport to cover a wide field and pertain, among other things, to the condition of health, mental condition, personal habits, disposition and character, degree of intelligence, religion, race and descent, reputation for honesty, and credit and other matters pertaining to these prospective jurors.

The court feels that the filing of these papers amounts to an unwarranted intrusion into the private lives of other persons, and especially since it is of little or no value to the defense for the purposes of these motions.

If this practice were to be tolerated, and prospective jurors knew they were to be subjected to such investigations and reports, they would be fully justified in objecting to having their names deposited in the jury wheel by the jury commissioners.

These men and women were respected and representative citizens of this community. They were summoned

for jury duty in compliance with a court order and for which they were in no way responsible. To file as a permanent record in this court such a report as to each one individually is, in the opinion of the court, an act of the most inexcusable and contemptible character, and one which they have every right to resent. This court is surprised that reputable attorneys would permit such a thing in a case in which they were counsel.

The motion of the state to strike from the record this affidavit and the attached reports is sustained upon all the grounds stated in the motion, as to the reports and papers attached to the affidavit. However, the court will allow the affidavit itself to remain, so that in the event of review by another court, it will be before the reviewing court.

The court does sua sponte, or of its own motion, also strike from the record the affidavit made by Elmer Ayres and filed in this case by the defense.

Both of these motions are therefore overruled, and counsel for the state may prepare and submit the proper entry.